THE SOCIAL NATURE OF INTERNATIONAL LAW

by

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Initial views concerning the social nature of international law are of fairly recent origin and the pace of their development cannot be described as a rapid one.[1] Although the existence of international law is as old as the states, a very long time elapsed between the peace treaty concluded by two Mesopotamian city-states some 3.000 years B. C. and the foundation of the Spanish school of international law in the 16th century.

The four thousand five hundred years that elapsed between the two landmarks did not always provide favourable conditions for the development of international law nor for its treatment from a scientific aspect. This particular branch of law had several flourishing periods, for example, over one thousand years in the East and then following the 7th century B. C. in the relations between the ancient Greek city-states. The Roman Empire, however, brought about a new situation. When Rome was just one of the innumerable city-states lying on the coast of the Mediterranean, it established broad contacts with the other ones that were its partners and it transferred its attitude of respect for the law and applied legal formalism both of which were so characteristic of the Roman approach to shaping its ties with the other fellow city-states. However, when Rome grew stronger and it gradually invaded the Mediterranean states to establish a huge empire in the then known world the development of international law was brought to a stop, because at that time there were no states left for Rome to sign an agreement with. While "Roman law" made a tremendous development within the Roman Empire and laid the foundations of the civil law adopted by the societies of commodity producers, all the paths of progress for international law were blocked. Quite specifically, that was the case not only for the period while the Empire existed as is mentioned by László *Gajzágó* in his excellent historical work: "...following its disintegration the Roman Empire passed down, in international respect, its own imperial system and the related way of thinking to be inherited by its successors either by handing down its realistic achievements and partly as a customary way of thinking both of which prevailed with the successors for another thousand years or so. In

the history of mankind the predomincance of thinking in terms of an imperial system accounts, therefore, for over two thousand years."[2] By no means does Gajzágó asserts in his work that the coexistence of societies which were relatively separated from one another in the above mentioned period was a notion completely unknown which ought to have been discovered at a later stage. The point is, as he mentions later, that the idea of imperial system was or continued to be predominant in the public thinking, in their views concerning the various political and organizational forms. While elaborating the point Gajzágó has in mind, above all, the Papacy, the Holy Roman Empire and the Islam.

Because of its characteristic setup and dependence system feudalism did not create especially favourable conditions for the progress of relations based upon equal footing, including international law, between the separate entities. It is true that certain relations established between the individual entities of feudalism and some of them were subjected to legal regulation, but this process was rather reminiscent of the development of internal law in view of the fact that the standard feudal conditions of super and sub-ordination had the decisive role to play in it.

So far as the other continents of the age are concerned, the pattern was quite similar because plans for establishing and afterwards preserving their own empires were in the focus of the objectives of the rulers of both India and China, and the absence of relations either between them or with Europe did not make it necessary in any form to develop some kind of international legal system.

In Europe, it was the age of the great discoveries that meant the end of the final attempt to establish an empire. Although Charles V. managed to be made King of Spain and Emperor of the Holy Roman Empire but in spite of all he, too, proved to be unable to translate his ambitious plan into practice. One obstacle was that the borders of his Empire were extended to overseas territories, a fact that rendered the practical implementation of the idea physically impossible. The fact that the age in question saw the appearance of the first views that can be generalized for international law and that they emerged on Spanish soil is by no means incidental.

The first approaches were, of course founded upon a *law of nature basis*. The only task the scientist of the age had to accomplish was to explore and disclose the existing laws governing nature and to summarize them. An attempt to this effect was made, among others, by the representative of the Spanish school of international law to which Francisco de *Vitoria* and Francisco *Suarez* belonged in the first place. They classified the law created by God into the category of law of *nature:* in their teachings law of nature and the divine law were merged into one quite obviously because, as they professed, nature is nothing but the arrangement of things and life by God. As Suarez writes international law "is based upon the fact that the human race represents a certain unity in spite of the fact that it is divided into different nations and countries...and although each independent state, republic or kingdom constitutes by itself a perfect community...they cannot do without a sort of mutual assistance,

the company of one another and relations between them for the benefit of achieving increased welfare and higher gains ... For the same reason they are in need of a law that governs and regulates correctly their attitude to one another and the intercourse between the members of this society. In most part this is done with the assistance of law of nature, but it is not quite sufficient and does not quite involve everything directly. That is why very specific legal provisions could take root in the intercourse between nations merely as a result of the practice adopted by the individual nations."[3] The statements quoted above were, indeed, revolutionary ones in the period of establishing an empire. Because what Suarez meant was the society of nations and not an empire extending to the world and unity could be implemented by way of mutual assistance and cooperation and not through subordination. As regards the history of ideas, that was the stage at which the imperial idea was made to retire. However, the views outlined by Suarez continue to be revolutionary ones even during the time dominated by the concept of law of nature because they assert that in addition to the sources of law of nature there is also another source, namely the practice of the state. It is also true, however, that a couple of lines later Suarez adds that the law that developed in the course of this practice "is partly not a voluminous one and, on the other hand, it is very close to law of nature; moreover, it is easiest to deduce it from law of nature". Vitoria's opinion is quite similar. But he goes somewhat further than Suarez by saying that human *will* can also establish international law as soon as it emerges spontaneously in the majority of mankind. Needless to say that this is also law of nature. Suarez makes the point quite clear when he declares, "the right of peoples is always law of nature or something that stems from nature"[4]. That provided the theoretical conditions for a break with law of nature.

And soon the social conditions for the break were also created. The period in question was the age of bourgeois development, the time of the establishment of the national states. In barely two decades after the abdication of Charles V Jan *Bodin* published his work, Six livres de la Rèpublique, which is the first ever complete elaboration of the idea of sovereignty. Although Bodin spoke about the prince's sovereignty but in practice what he outlined was the sovereignty of the state of a kind which is independent of the pope and the Emperor and is also independent of any sort of external or internal power.

So far as the question of the essence of international law is concerned, the next major step forward and beyond the limits of the concept of law of nature was taken by *Grotius*. He lived at a time when the theoretical foundations of the concept of law of nature were increasingly undermined by the new and different phenomena of social development. International trade becoming ever more intensive and increasing political relations between the states made it necessary to conclude international agreements in a growing number. And that was more than mere state practice, for the norms which had obviously been established by man could no longer be deduced from law of nature. Credit is due to Grotius for being the first in

the world to make a distinction between international law deriving from law of nature and brought about by the human will. In the opinion of Grotius law of nature is the command of the sound reason while the law of the will can equally stem from God or from the peoples. He stated that, the source of law proper is to appropriately safeguard human reason and ...the interests of the community. There can also be another source of law in addition to the that natural source; and that is God's free will to which we have to subordinate ourselves according to the incontestable command of our own reason. ...But since the legal provisions of each state are designed to serve the benefit of a particular state, certain legal provisions can be established under *common agreement reached by all or several states* and they will be for the benefit of the whole and not merely that of individual communities. This is *described as international law* as distinct from law of nature.[5] The lines quoted from Grotius contain the reply supplied by the Dutch jurist to the question of the nature of international law. And in fact his reply has continued to be the only generally accepted answer to the present day; basically, it has remained intact over the past three and a half centuries apart from the implications of law of nature which have been removed from it as the years have elapsed. The point of interest lies in the fact that nothing new has been added to what Grotius stated in the mid-17th century to the present day; all that has been done subsequenetly is confined to some modifications made from time to time at best. The idea laid down by Grotius is shared even by the science of socialist international law.

The law of the will put forward by Grotius was later termed "positive" law. It was an unchallangeable sign of positivism gaining ground that the international lawyers of the age concentrated their efforts on exploring the norms that the states *have to observe* in their relations with one another instead of the manner in which they *should* behave in these relations. International lawyers then took to collecting agreements. The German scholar Gottfried Wilhelm *Leibnitz* was the first to compile the initial collection of agreements in 1693 and it could no longer be regarded as a collection of the rules of law of nature.

Occasionally, there were considerable detours characterizing the development of positivism. In the mid-19th century, for example, the English lawyer John *Austin* stated that positive law is a set of commands of a sovereign who has powers to enforce them. But in view of the fact that in an international community there is no such sovereign, international law is by no means positive law; it is merely a system of the norms of "positive morals" and as such it cannot be regarded as law at all.[6] The representatives of the *German positivist school of law* who were based on Hegel's philosophy maintained that in actual fact international law is "external state law", in other words the extension of state law to international relations.[7] Such and similar views, however, never came to be generally accepted and the influence they exerted was rather a short-lived one.

But this does not apply to the theory of self-limitation submitted

by *Jellinek*, a view that continues to figure or reappear even today in most of the sovereignty based concepts. Jellinek put forward the idea that the states, the possessors of supreme power have an absolute freedom of action which, in case of need and by relying on similar statements by other states can be subjected to self-limitation. According to his view international law would be embodied in concordant statements of self-limitation.[8] The theory suggested by Jellinek came under fire from many sides. His critics based their views principally on the thought that the partners of a state adopting self-limitation cannot have full confidence in that state and explained that in case a state can set limits to its freedom of action at its own will, it obviously has the right to lift the limitations it imposed on its own. In other words, there is a danger that any state can abandon its commitments arising from international law any time.

The theory giving promonence to the common will of states was designed to offer a solution to the above mentioned problem. In his book published in 1899 the German lawyer *Triepel* explained that in international law only a will superior to that of the individual states can bring about norms that are obligatory for the states. Such a will can be established on the basis of agreement concluded by the states, and, as a result, the different wills of the different states are actually merged into a united will. In Triepel's view the common will laid down in an agreement is not simply the totality of the individual wills, but it is an independent product which, ever since its birth, leads its own life.[9]

In connection with this theory *Ago* is quite right in saying that international law which is based on such foundations might become completely rootless since the artificially constructed will would not be associated with any kind of medium: either with the individual states or with a sort of supranational institution. It would, therefore, become a will related to no subject.[10]

As a matter of fact common will which is distinguished from or contrasted with individual state will is a characteristic bourgeois democratic concept, because the assumption that any majority represents progressivism and social justice and that the will of the majority is the most important scale of political values has always been the official theoretical foundation of the bourgeois society. The contribution by Triepel was, therefore, nothing but translating this concept into the language of international law. Common will, however, is embodied in the general customary law which is accepted by the overwhelming majority of the states and it acts as a support for its validity. In vain do we try to find any kind of common will in a bilateral agreement or even in a norm based on customary law. Thus Triepel created not only a will, associated with no subject while elaborating his concept but he also ignored particular agreements of will.

In his book written in 1902 *Anzilotti* also speaks of concordant will but he adds that the source of international law is not any kind of superior common will but it lies in a basic norm which forces the state to adhere to international agreements. This basic norm is the *pacta sunt servanda*. Anzilotti considers this basic norm as being of an objective and absolute value,

an initial hypothesis which is impossible to prove and to which each known human order can necessarily be traced back. In his opinion this does not mean that there would be no other method for laying the foundations for the principle of pacta sunt servanda. The point is that any other kind of foundation which can be given, for example, from an ethic or political aspect does not belong to the realm of the science which is confined to and concerned with studying international law.[11] *Thus Anzilotti discards offhand the necessity or applicability of a sociological approach (or any type of approach on a social science basis) before allowing anyone to engage in the explanation of this kind of approach.* His attitude is characteristic of the overwhelming majority of the different legal views. The concept that the lawyer must not go beyond the frame of legal dogmatics is carried through most consistently by *Kelsen.* When creating "pure theory of law" he takes a position on the concept of the basic norm so that he rejects the agreement as well; he states that only a norm can act as the foundation for the obligatory nature of norms.[12] But while Anzilotti fails to pay special attention to the question of where the basic norm assumes its obligatory nature from, Kelsen states that the basic norm is nothing but the norm of customary law when he says that the states must act in a manner they normally do. It is another question that the outstanding scholar does not at all stick to the analysis of legal forms isolated from the conditions of the society in his other works.[13]

In connection with this the best known Soviet international lawyer *Tunkin* is quite right in stating that the concept of a basic norm sets out from theorems referring to law in general and to international law in particular as a closed system of its own, in spite of the fact that universal correlation of phenomena is a general rule that is valid for both nature and the society and quite obviously, international law is not separated from the rest of social phenomena by any barrier that would be impossible to surmount.[14] It is assumed that there is an opportunity for performing a complex examination. Tunkin, however, is content with drawing the above conclusion, and like the other socialist international lawyers remains as I have mentioned before, with one of the above listed theories, namely the theory of agreement. He goes no further than stating that it is not necessary for an agreement and, as a result, for the establishment of international legal norms that the will of the state-parties should be completely identical and that it should become a united will. For he maintains that in the processes of establishing norms rather conflicting wills are involved which, in a given case, may well have conflicting class character. Wills of this kind, he goes on, are far from being identical ones and as such they cannot be merged into a united will. In spite of this, however, Tunkin adds, they are concordant and they are geared towards their accepted as a definite rule assuming the role of a norm of international law.[15] Thus the Soviet author draws a line of distinction between the "concordant" nature and "identity" of wills. He suggest that concordance can be identified in respect of the acceptance of a given rule as a legal norm. He adds that in this respect will mutually

presuppose one another but he reiterates that it is valid only in this particular respect. The agreement of a state that one or another of the norms be accepted as a norm of international law can invariably be achieved on condition that similar agreement is displayed by another state or states.

The views elaborated by Tunkin have, in practice, been accepted by other socialist lawyers. His position is adopted, among others, by the work summarizing the results of Soviet international law published recently in six volumes and a number of other studies[16], and the same attitude is present in the latest textbook for the Hungarian law schools. "While domestic law expresses the will of one state", the textbook writes, "the provisions of international law are brought about by agreement between the wills of two or more states. One of the most conspicouos features of international law is, therefore, that this law is founded upon the concensus of states... [in spite of the fact that] the will of the states creating the provision of international law has different objectives; this is the situation, in particular, when a legal provision is established collectively by states with different social and economic systems".[17]

It is hardly possible to raise doubts as to the principal point of the theory, that is to say that international law is created as a result of agreements reached by states, and no legal obligation can arise for any state with which it has not agreed beforehand. In the domain of international relations there is not a single supreme power which would have the right to establish obligatory norms for the subjects to adhere to without first having their agreement to this effect. Any attempt made up till now and designed to impose a supranational norm-creating process (even within the narrow limits of a smaller group of states, as for instance, the Common Market) is doomed to failure. In international relations no such practice has as yet been established which is common to domestic law where the subjects are not consulted, in the majority of cases, in advance whether they accept this or that type of obligatory norm. In this connection the traditional theory of agreement is adequate to social reality: international social conditions and the conditions of international law built upon them correspond to one another. Thus the problem, in my view lies elsewhere, namely in the fact that the difinition of the theory of agreement discussed in the foregoing offers few if any opportunities for further examination, above all, for sociological examination; I mean studies wanting to penetrate deeper in finding out more about the realities of the society. The definition quoted above tends to treat the state in an antropomorph manner, to a certain extent, because the category denoted by the term "will" is frequently used in connection with a personified subject such as "people's will" or "class will", but it is not regarded as the only key notion to be used in the given connection. It must be noted that will is a psychological category in the first place and, for this reason, using it in connection with the state which is the most complex institution of the human society may well lead to drawing false conclusions. The fact that the participants of an international meeting speak of behalf of states can undoubtedly make the impression that they represent the will of an entity which is still to be struc-

tured. However, it is only a simple social and legal fiction which can be suitable for serving certain objectives but not for building up a complete theory.

The English political scientist John *Burton* is quite right in pointing out that, among other things, it was the traditional attitude of international law, the concept of the international legal subject that had the major role to play in the approach according to which the state was regarded as a single and undivided political entity.[18] Whoever happens to conclude an international agreement whether he be the president of a state or a minister in charge, or whether the agreement involves the most important issues of the state concerned or an area of very little significance, the state will formally became *en bloc* the subject of rights and obligations. It may well be that the cooperation specified in the agreement calls for the mobilization of the total political and economic strength of the respective state, but it may also be that a couple of measures to be taken by the local administration are sufficient to fulfil the agreement. Formally, the same duty is involved in both cases, because the agreements are equally obligatory for the parties to them. However, it would be very useful to take into consideration an important aspect, nemely, that the subjects of the newly established legal relationships and those of the transnational social relationships are very rarely identical. To put it more accurately: international law has fictitious subjects in almost every case. For example, when a health agreement is to be signed it is not the *state* that is negotiating the provisions of the agreement with another state, but the minister in charge with his colleague; and even if some other government authorities are included in negotiations, they negotiate, after all, about a cooperation belonging to the range of authority of one ministry. Therefore, in such cases it is not one state that cooperates with another, but one central organ of state administration with its opposite number in another state.

The definition of the Hungarian textbook quoted above is rather self-contradictory even if one thinks in terms of the category of an impersonified state. It would follow from the quote that in the course of bringing about an international agreement the wills of states are designed to serve different objectives, but in spite of all that they can be coordinated. This, however, is not possible because there is hardly any action without a related will (apart from acts performed out of carelessness or by mistake, but they are far from being characteristic for concluding an agreement). The will of a state is either designed to conclude an agreement – and then it will be signed – or it is opposed to it and then there will be no agreement. Obviously, the authors of the textbook had in mind the idea that although the general political and strategic objectives of the states entering into international agreement with one another can be different, the identity of their interests, however, makes reaching agreement possible and necessary in specific cases. In such instances not the wills but the long term objectives are different from one another. Tunkin was aware of possible contradiction in this respect; that is why he said that the conflicting wills are not identical and cannot merge into a unified will either, but they

can be concordant in respect of the acceptance of one or another legal norm. This, however, is not sufficient to eliminate the contradiction, since "concordant" will does not presuppose a much lesser measure of identity than "identical" will. In connection with this category I must emphasize that it is rather unfortunate to use the term "concordant", because only appropriately defined wills can be concordant which are incidentally, what the texts of the agreements are. For this reason Tunkin uses the notion of will in too general a context; he thinks that there can only be a will concerned with long-term objectives and ignores the possible existence of will necessary for performing any concrete action.

It follows from what I have discussed so far that when we seek a definition of the nature of international law, "agreement of the wills of states" cannot be regarded as an adequate starting point. Although the category of "agreement" would, by itself, be applicable, I think it would be more correct to use a concept which could widen somewhat the area to be studied. The fairly common idea according to which international law is brought about by way *agreement* between states as opposed to domestic law which contains the *commands* of the state rather divides the origins of the two legal systems. It suggest that there are two processes involved but they differe from one another in respect of quality; to study them simultaneously is impossible or unnecessary. In fact a unified process takes place whose participants are identical (the central political organs and institutions of the states which possess real power) and both the political functions and objectives of the participants are identical, too. The function of the Central organs includes, first of all, maintenance of a specific system of property relations, enforcement the given political power, safeguarding the integration of the society and keeping the opposing political forces under control. *Both the system of domestic law and the establishment of a system of international agreements are means of fulfilling this function.* As a matter of fact the function which was described in detail above can be fulfilled only on condition that the political system existing within the state borders operates relatively free from external disturbing factors. From the point of view of those in power it is, after all, much the same whether their power is threatened from "inside" or "outside". Dangers arising from outside, that is beyond the frontiers, constitute a threat to the same power that are defended by the central organs from inside. Of course, there is more to it than just sheer defence. In order to fulfil the function mentioned above the state organs also display an active attitude in an effort to change the environment. They try to strengthen such social processes which are favourable for them and try to weaken those that are unfavourable from their point of view. The same applies to the other functions. The other fundamental function to be performed by the leading state bodies is to organize the activities of the society as a whole, in particular, ensuring the conditions necessary for production. Within the state this function is manifested, among other things, in the establishment of an adequate system of economic institutions, in seeing that the financial balance is maintained, and so on, while in respect of

external affairs, it is manifested in promoting participation in the international division of labour, in taking measures to protect the national economy, and so on. In this field, it is again necessary to resort to and use the means of law.

It can be concluded without elaborating the problem any further that, to a certain extent, we can speak of *an essentially uniform function of the central organs of the states and of a basic identity in terms of the means adopted in the course of performing this function.* That is why when discussing the questions of law-making I would prefer the use of a common notion which would be capable of including the specificities of both the "internal" and "external" functions. The most suitable term to this effect could be *decision-making*, a fundamental notion as often used and studied by sociology. While performing their functions the central organs of the state continually make decisions part of which assumes a legal form. In this context *domestic law and international law can be defined as the forms of decisions made by the central organs of the individual states either separately or collectively.* Naturally, this definition is not an absolutely genuine one but as far as I know it is available in literature on international law in the works of only one author, *McDougal*, but he treats it only in a by-the-way manner and, for that matter, it is not very much elaborated.

McDougal defines international law as a "*flow of decisions* in which community prescriptions are formulated, invoked, and in fact applied in the promotion of community policies".[19] However, the American author fails to define what he actually means by the notion of decision; he goes only as far as stating that "decision-making is a dynamic process in which decision-makers ... are continually creating, interpreting rules and continually formulating and reformulating, applying and terminating, policies".[20]

The notion of decision-making concerned the broadest interpretation in Hungarian literature has been submitted by the sociologists *Hegedüs* and *Rozgonyi*, who list the following stages as being the principal ones of decision-making:[21]

1. Accumulation of information promoting the recognition of the necessity of making a decision;
2. Those concerned recognize the need for making a decision and they formulate the problem on which a decision should be made;
3. They collect further information and elaborate the decision-making alternatives;
4. They choose from among the alternatives (according to the authors this is the only stage which is commonly called decision);
5. Implementation of the decision, that is carrying it out in practice and controlling the execution.

Obviously the stages listed above are not formulated in a manner that they could directly be applied in connection with international law. It must be born in mind that notions supplied by sociology are associated with a different level of generalization. The study I quoted, however,

contains a statement that in reality the process that takes place is longer than what is termed decision in the common language. Even formulating the issue on which a decision should be made is a sort of decision, because it is not indifferent a matter which particular issue or problem has been selected for having been regarded as one which should be settled. Moreover, even at the second stage the manner in which a problem is formulated already contains quite frequently the final decision because the alternatives offered by those preparing an issue for decision are such that only one of them should be preferred. It is a general experience that the content of decisions, so far as its principal aspects are concerned, is established already in the course of the preparatory stage. In the case of proposals to be submitted to the highest level decision must be made, as a rule, on a couple of questions only left open by the experts participating in the preparatory work; as for the rest of the issues, decision is essentially made on them on the lower levels. It must be noted that the opposite of this sequence is also true because a decision is virtually often made on the questions right at the start when the highest level formulates the "directives" or "guidelines". In such cases the experts are left with the job of elaborating the details only.

As has been discussed decision-making is, in fact, a longer process; in spite of this, however, impossible to include all the five stages enumerated by Hegedüs and Rozgonyi in this process. For example, what the two authors describe as "accumulations of information promoting the recognition of the necessity of making a decision" can hardly be regarded as a constituent part of decision-making. Decision-making proper begins at the stage when, out of the accumulated pieces of information, the ones in favour of making the decision are selected. This coincides with the stage at which "those concerned recognize the need for making a decision and they formulate the problem on which a decision should be made."

Nor could be included the implementation and the control of decision or decision-making proper because they are what they are denoted by the respective terms: implementation and controlling implementation. It is possible, though, that in the course of the above two processes new decisions are made (as has been mentioned by McDougal) which boil down to modifying or falsifying the essence of the original decision but these constitute the parts already of a new decision-making process.

In an article discussing this problem Boldizsár *Nagy* is absolutely right when he says that in actual fact there is no such thing as only one decision if we wish to give an accurate formulation. In the reality of everyday life, he says, there is an endless succession of decisions from which to grasp or isolate one decision is the result of scientific abstraction.[22] I can add that the same applies to law-making. Because the fact of the matter is that the law-maker picks out one of the series of decisions that can be observed. This is the one which he wishes to turn into a legal formula for some reason or another and for the implementation of which he intends to rely on the means of the technical arsenal of law. Obviously, the sociological examinations must concentrate attention on *this particular* decision

while the manner in which the "minor" decisions were made in the preparatory stages must naturally be studied as well.

As far as the stages suggested by Hegedüs and Rozgonyi are concerned the ones from 2 to 4 deserve special attention to be paid by international law-makers. Of them it is evidently stage No. 4 which results, strictly speaking, in the establishment of an international legal norm, for this is the stage at which the participants "choose from among the alternatives" – as the Hungarian authors put it. What is meant by this in the literature on sociological organization is a choice between two appropriately distinguishable alternatives but neither of them can be absolutely certain or impossible.[23] Other opinions suggest that this interpretation is slightly of a mechanical nature, because it contains the assumption that in the event of each decision-making there are alternatives available to enable a "free" choice, although a closer and more thorough-going analysis of the alternatives often shows that there is only one sensible choice, or there is no alternative at all. According to this view, in the normal course of events the alternatives are nothing but apparent alternatives in general and decision making is left with the essential task of exploring the very action out of the set of actions thought to be possible by an outsider that can really be accomplished under optimum conditions. (Perhaps there is a difference of opinion at best held by the people participating in the decision-making as to which is the best possible or only alternative.)

When criticizing the above discussed position Boldizsar *Nagy* explains[24] that in case none of the alternatives outlined in the course of decision-making is certain or impossible a selection muct be made. For if the "thorough-going" examination of the problem resulted in only one sensible alternative left for the decision-makers, it means that it is *their choice* or their evaluation of the alternatives. In the opposite case an a priori coherent order of values should be assumed which is accepted by everyone even in respect of its details and all left to be done would be to compare it with the different alternatives in the course of decision-making. In reality, however, even the order of values is a matter of selection, at least in the sociological sense of the term (apart from the general determination of human behaviour considered from a philosophical aspect). Incidentally, the psyche of those participating in decision-making is not a system either that would be free from contradictions. In the case of different decisions the norms taken into consideration by the participants can result in different priorities. This means that even if the situations are identical in principle, they tend to consider one or the other as being the optimum one and which should, therefore, be selected. So their decision alternates.

Decision-making is a process of action planning which begins with the recognition of the need for making a decision and ends with a choice between the alternatives, with the formulation of the problem to be submitted for decision and the elaboration of the alternatives lying in between. Compared to this *decision proper is the relative closing stage of the process of action planning, the purpose of which is to set the action of those involved, or the series of*

their actions, that is, their behaviour. The reason for describing decision as a relative closing stage is that the process can begin all over again and a new decision can modify the previous one. However, there is still an element of stability in the decision – as opposed to closing a simple purposive human behaviour – since the *decision* once made *results in relative stability* in the relations between the decision-makers and those to whom the decision is addressed, or in the relations between one another of those to whom the decision is referred. The stabilizing effect is, of course, largely enhanced in case the decision is transformed into a legal form. Namely, in vain does domestic law or even international law offer a number of opportunities for modifying or terminating the individual norms, this is evidently a much more difficult procedure than when a decision is made under informal conditions and is also implemented in an informal manner.

Two types of decisions can be distinguished: one is the coordination type and the other is the subordination kind of decision. The decision of *coordination* type is designed to coordinate the actions and behaviours of people who are at the same level of the hierarchy. In such cases the decision-makers do no more than making a decision on shaping cooperation between themselves in a specific manner (for example, company managers decide to cooperate in production). In the event of the *subordinated* type of decision those positioned higher in the hierarchy direct the activities of those subordinated to them (the company managers give instructions to their own employees). The two types of decisions naturally overlap each other in several respects. Quite a few coordination type of decisions contain subordination type of decisions since if the company managers make a decision on production cooperation they practically make a decision at the same time also on the manner in which it should be implemented by the employees subordinated to them. Formally, this type of decision is as much of the coordination type as, for instance, the decision made by the members of a working team on the division of they labour. In the decisions of the subordination type, however, generally determine not only the behaviour of the people expected to carry them out but also the own behaviour of the decision-makers.

The *domestic* law serves as a framework for decisions of the subordination type because since the central state organs attempt to guide the behaviour of persons and organizations living in the territory of the state by relying on the law for assistance.

However, when the individuals and the organizations carry out actions which go beyond the borders of a state, in other words when social relations are established between the subjects of one state and those of another state, at a certain level of the intensity of these relations the necessity of coordinating decisions on an international level will invariably arise. This is the stage at which the *international coordination of decisions of the subordination type takes place. The objective is that the states should be enabled to shape their domestic system of governing the behaviour of their own citizens in harmony with that of the other states. In other words, there should*

be rules of behaviour which are either identical or harmonized with one another in order to apply them to all the subjects of the international social relations.

What is meant is not only to govern the behaviour of the individuals and their organizations that lie outside the central power institutions of the state. The need for coordination arises, of course, also in connection with the activities carried on by the central institutions themselves (thus, for example, when ensuring the diplomatic rights and immunities, the states concerned must coordinate the measures which are to be taken by the respective central organs of state administration).

A similar distinction serves as a starting point for László *Buza*. The late Hungarian international lawyer made in one of his earlier works a distinction between the *law of commands* and the *law of promises*. In his opinion, international law can be classified into the category of the law of promises, but it remains to be a conditional type of law because, as he puts it, "its validity is made to be dependent on the other state making a promise, too, as to what its behaviour is going to be."[25] In fact, international law-making actually includes an element of promise as well, because all the parties concerned make a promise that their behaviour will follow a specific line. The "decision of the coordination type", however, can better express the essential point considering the fact that the notion of decision includes the element of undertaking a certain responsibility, too (that is to say, the parties make a commitment that they will carry out under any conditions what is included in the decision). At the same time, a promise can be cancelled unilaterally. It is also much more fortunate to use the word "decision" because neither the word "command" nor the word "promise" presupposes that the two of them have anything in common, although, as has been pointed but, both domestic and international law making are essentially identical processes.

It is only a specific characteristic of international law that it tends to present decisions in which element of the subordination type are predominant as decisions of the coordination type. The best examples on hand to this effect are the peace treaties. For in this case the victor has the right to make a decision to be applied to the defeated party and considering its essence such a type of decision reveals hardly any difference compared to decisions made by a supreme power within the state and valid within its borders. In a case like this the parties' behaviour is hardly coordinated because what is expressed in this state of affairs is a clearcut subordination of the defeated party. For quite obvious reasons, however, both parties (the defeated one as well) insists on the idea of equality which is, naturally, far from the real situation. The situation is much the same in the case of a number of other kinds of decisions which are termed by international legal terminology as "unequal treaty".

But to come back to the statements made by *McDougal*, the American author does not think that the essence proper of international law would lie in the decisions made on cooperation. In his study I referred to earlier he explains that international decisions are designed to allocate and reallocate *values*.[26] He argues that the processes taking place in the world

involve a struggle between demands and counter-demands. There is a shortage of values in the world; for that matter the decisions made concern the manner in which the values available but being of short supply should be reallocated. In his interpretation the demands are made to allocate and reallocate power as well as material, cultural and political values and the establishment of international law means an end to the struggle between demands and counter-demands. International law would, according to the above interpretation, record and fix the allocation of values between the states for a definite period.

However, McDougal's idea would suggest the acceptance of a somewhat static image of the world. It is true that in the international scene there are, in fact, such decisions which are concerned merely with the allocation or reallocation of the available values. The best possible examples to this are the border treaties because of the large group of assets it is the territory that is not available in unlimited quantities and this will continue to be the case in the future as well. Treaties on the spheres of influence used to be of the same nature, for they in fact included the actual allocation of economic and political power. Today, however, it is less and less characteristic of the decisions made on the international plane to have such a content. McDougal ignores the development made over the past few decades which is characterized by the unprecedented broadening of *cooperation* between the individual nations. Cooperation is still invariably regulated in the course of confrontation between demands and counter-demands, but during the process the point at issue is the *dynamic* rather than the static allocation of values in the majority of cases. This can be experienced particularly well in the case of the decisions made within the economic integrations, but even a simple custom agreement can serve as a good example for dynamic allocation (as a matter of fact establishing custom duties in a coordinated way means increasing advantages for both the producers and consumers living within the territory of either of the contracting states).

What has been discussed so far can render irrelevant the century old debate on the *relations between domestic law and international law*. Since international law is made by the same state organs as domestic law and that international law, for its most part, is designed to coordinate the subordination type of decisions made by these organs, the question of whether domestic or international law should be applied in the event of a conflict between the two of them can no longer have a *theoretical* importance.

As is well known, two conflicting views were developed earlier in connection with this problem within the *monistic* theory. One view suggested that in the case of conflict international law should be applied instead of domestic law, while the other opinion called for the application of domestic law. According to the *dualist* theory the domestic and international systems of laws had nothing to do with one another. It would go beyond the scope of the present study to analyse in some detail these theories but it has to be made clear that what is involved here is nothing more than a question of *legal technique*. For in case someone is of the opinion that

international law should be preferred at the expense of domestic law will, by no means, have in mind any sort of violation of national sovereignty which is a point so frequently discussed in the different textbooks. To a given state only that particular norm of international law will apply which it accepted earlier in one form or another (for instance, as customary law or under an agreement). Preference for international law as against domestic law means only priority given to *one* of the decisions made by the central organs of a state as against *other* decisions made by the same organs. Thus there are no external forces that have made a decision which must be implemented by the domestic subjects; the point is that decisions made by the organs of the same state ran counter to one another for some reason. It is quite evident that international law can never be regarded as some sort of "external" law for a state or its citizens. It is quite another matter that maximum legal security must be provided for the individuals and the organizations of a state; this can only be achieved if they are told absolutely accurately the norms that apply to them including those of international law. This practice is adopted and adhered to by the states which have accepted the idea of priority given to international law and adopt it in practice appropriately by publicising the treaties and agreements from time to time. (A practice of this kind was virtually indispensable in the case of an organization like the European Communities which makes an enormous number of decisions successively.)

What has been said in the forgoing applies also to the view prefering the priority of domestic law. In the event of a conflict between domestic and international law, the case will again that two decisions made by the same central organs of a state are running counter to one another, and priority provided for domestic law will perhaps be favourable for the individual citizens but hardly for the state they belong to. Because the state will be left with the unpleasant consequences of the violation of international law to deal with (since preference for the domestic law invariably means non-fulfilment of international legal obligations).

As far as the *dualist* concept is concerned its supporters set out from a false assumption when they argue that the two legal systems exist independently of one another. As has been shown in the foregoing the situation is just the opposite, since the two legal systems, the monistic and the dualist are similar, but they take different forms for preventing the same social phenomenon and there is a close relationship between them. It is, therefore, hardly possible that the essence of dualist concept would correspond to the "socialist view", a point asserted by the present Hungarian university textbook on international law.[27] In an age characterized by the steady intensification of the internationalization of social relationships it would correspond more favourably to the socialist view if the individual states made the implementation of their decisions of international implication as simple as possible; to facilitate this approach *priority should be given to international law* which is most likely to appear to be the most convenient form of the legal technique.

Incidentally, not all of the international decisions assume an inter-

national legal form. There can also be absolutely informal decisions which, although made, are not recorded in any form; nevertheless the parties involved do not hesitate to implement them. There may also be such decisions which, though recorded, are not desired by the parties concerned to be raised to the status of legal provisions. Written international legal norms are only created in case the nature of the decisions made and the interests of the decision-makeres call for the formulation of rules on the highest level. This takes place, above all, in the following cases:

1. if it is justified by the importance of the decision, its specific nature, or the high number or complexity of the patterns of behaviour determined in the decision;
2. in case the decisions are intended to be effective for a longer period;
3. when it is necessary that the decisions should be known by many people in an authentic form.

The extent to which formalism has been introduced is of such a degree that in certain cases, especially in the international organizations, there are separate (procedural) norms to be applied even to the process of making decisions. In addition, the specific structure and formulation of norms, their extremely high number and the clarification of relations between the different norms containing decisions made at different places and on different levels call for such sophisticated and special knowledge of interpretation which make it imperative to set up an independent professional staff which is specialized for the job.

The majority of decisions assuming the forms of international law do not as yet arise from within an organized framework. For the time being a broad scope is still provided for bilateral and multilateral negotiations and the traditional methods in general. It is a fact that the role being played by the international organizations keeps increasing in universal human cooperation and an increasing number of decisions are made as a result within the framework of an organized and appropriately regulated process. As is stated by Kálmán *Kulcsár* the organization can actually be regarded as a machinery serving the purposes of making decisions on various levels and of implementing them (which, eventually, leads to making a new series of decisions on a lower level).[28] It is quite evident that the decision-making in an organized way increases the rationality and efficacy of the decisions as compared to the non-organized and "diplomatic" way. One of the most important stages in the development of international cooperation was the appearance of the organizational forms of state administration and bureaucracy just like in the internal development of the states. In connection with this the conclusion of *Weber* is valid; he maintains that a bureaucratic organization which has its own well-designed hierarchy, which operates on the basis of spheres of authority specified accurately and defined universally by the relevant rules laid down in advance, a buildup which is characterized by advanced methods of administration and writing, in which highly specialized activities are carried on

by well-trained and specialized people who want to make a "career" within the organization, is superior to any other types of decision-making even from a *technical* viewpoint.[29] On the international scene it is the organizational form possessing a well built up and advanced bureaucratic machinery which can be considered as being the most suitable means of organizing the activities of the society to the optimum, of making the most rational decisions that are practically possible within the shortest possible time and with the least amount of labour invested and of resolving and eliminating the conflicts that have arisen on a most easy way. It is presumable, says Lawrence *Scheinman* that an organization can be regarded as an advanced one to the extent to which the decision-making powers are transferred to the level of the bureaucratic character; in case the normative form of decisions in an organization is not diplomatic negotiation but the administrative problem-solving, we can already speak of a change and the adaptation of the international system.[30] No doubt there is an amount of exaggeration in this view since as long as we continue to live in an age of decentralized international structure, a considerable proportion of the decisions especially those having much to do with power and politics will continue to be made in the traditional manner, that is to say in an informal fashion which is still assuming the form of diplomatic negotiations in which only the national bureaucratic methods and not the international ones will have a role to play. However, the development will be manifested in an increase in the proportion of organized decision-making.[31]

The last question to be answered is *whether or not the creation of customary law can be interpreted as an international decision-making.* In the realm of international relations customary law continues to go strong in certain areas in spite of the fact that the individual states and the international organizations are making substantial efforts to switch over to the practice of written law completely. At the same time there are areas in which customary law is still produced.

At first sight it is extremely difficult to interpret the repeated occurrence of a behaviour and the legal conviction (opinio iuris) attached to it —according to which a certain behaviour must be displayed from now on in the relations between the two parties concerned as an international decision. In my view, however, even this is a sort of a decision but the process of decision-making assumes a specific form. Considering the origins of customary law Max *Weber* states that "the sheer fact that certain processes are recurrent, that is they occur regularly irrespective of whether they are natural events or actions which follow from the routine operation of the human body and organism, or from subconscious imitation or from adjustment to the external living conditions, promotes these processes to be raised to the status of normative commands within a very short time.[32] Discussing the problem *Peschka* adds that "the idea that certain methods of action have an obligatory nature" stems from the actual regularity and the accepted customs".[33] Regularity or the repeated occurrence of a behaviour can give rise to such *expectations* among the parties

that the other side will most certainly display the same behaviour in the future. In attempting to find an explanation to the question Weber sets out from the prevailing economic conditions, or more specifically, from the nature of the exchange of goods. The idea that the other party will act as expected, is brought about in the parties while regularly exchanging goods. Weber states that a party intending to exchange goods with the other one can rely safely on the circumstance that it is his partner's egoistic interest to maintain this relationship.[34]

Thus the essential point is that the interested parties shape their behaviour in a specific way and *with a view to each other*. This calls for decisions to be made on the level of both the individuals and the central state organs, decisions that are made independently of one another but which are of identical content. However, the fact that the content is identical does not mean by itself that it is obligatory to adhere to a given behaviour. It is also necessary that subsequent decisions made, perhaps, at a much later date should clearly be founded upon the preceding ones including, naturally, the decisions made earlier by the partners. In addition, it is also necessary to achieve mutual but tacit consensus as to the decisions that will follow will be made as the form of application of the existing normative rule. Thus the specific feature of the birth and application of customary law lies in the fact that the series of decisons leading to *making law* is gradually transformed into a series of *implementing* the former decisions although the content of decisions remains essentially unchanged in the meantime.

There is only one difference between making written and unwritten international legal norms: while the written international legal norms are the results of the *joint and common* decisions made by central state organs, the unwritten norms are the products of decisions made *separately but with regard to the other parties involved*. It is, of course, a different matter that there are fundamental differences between the other characteristics of the two types of norms, in particular as to the degree to which they are applicable. Compared to the relatively high level of formality of the first type, the second one is of an absolutely informal nature and, for that matter, it can never be known completely nor can it be explored fully; moreover, doubts can be raised any time as to the existence of the majority of its provisions. No wonder that much less has been done to the present day in the field of the empirical study of unwritten international norms than with regard to the written ones.

If the problem lay merely in the simple fixing that is writing down a provision of customary law, this would possibly not be an independent decision as such since that move took place already in a previous stage of contacts between the states. But in the proper sense it has to be considered a decision, in the majority of cases, if no more is done than the selection of the existing provisions of customary law. Formulation in writing is, incidentally, such a process in the course of which the parties necessarily revalue, modify, broaden or unify the provisions that are too vague, contradictory or whose content is a matter of dispute. As a result,

a relatively new decision is made. This applies, in particular, to the comprehensive condifications carried out in one or another field of international law. In actual fact formulation in writing meant a special form of decision in international relations which corresponded to the requirements of modern administration. Switching over from the unwritten to the written formulation takes place when the parties make a decision on cooperation in the future. In other words, they want something more than what has been customary and routine and they wish to act in a new fashion. To this end a real decision must be made because it is no longer permissible to rely on the old practice. Customary law is a *static* thing, or, best of all, the pace of its development is very slow. Only a regular, systematic and, in particular, well organized kind of decision-making is ensuring a *dinamyc* development.

NOTES

[1] This paper is the firt chapter of my study: A nemzetközi jog sajátos társadalmi természete (The Specific Social Nature of International Law), Budapest, 1981.

[2] *Gajzágó, László:* A nemzetközi jog eredete (The Origins of International Law). Budapest, 1942. p. 6.

[3] Quoted by *Gajzágó:* op. cit. p. 287.

[4] Op. cit. p. 153.

[5] *Grotius, Hugo:* On the Law of War and Peace. (Hungarian translation.) Budapest, 1960. Vol. 1. p. 146 ff.

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[7] *Hegel, G. F.W.:* Grundlinien der Philosophie des Rechts. Berlin, 1821, *Zorn,* Albert: Grundzüge des Völkrechts. Berlin, 1903.

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[9] *Triepel, Heinrich:* Völkerrecht und Landesrecht. Leipzig, 1889.

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[12] *Kelsen, Hans:* Das Problem der Souverenität und die Theorie des Völkerrechts. Berlin, 1928. p. 105.

[13] See in particular his work Principles of International Law (New York, 1952.)

[14] *Tunkin, G. I.:* Questions of the Theory of International Law (Hungarian translation). Budapest, 1963. p. 171.

[15] Op. cit. p. 167.

[16] Kurs mezhdunarodnovo prava. Vol. I. Moscow, 1967. p. 14, *Levin, D. B.:* Aktualnüye problemü teoriy mezhdunarodnovo prava. Moscow, 1974. p. 25 ff., etc.

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[20] Op. cit. p. 182.

[21] *Hegedüs, András – Rozgonyi, Tamás:* Döntési rendszerünk (Decision-making in Hungary). Valóság, 1969, No. 7, p. 250.

[22] *Nagy, Boldizsár:* Reflexiók a nemzetközi jog alapfogalmaihoz (Remarks on the Fundamental Terms of International Law). Budapest, 1979. Manuscript.

[23] *Nagy, Tibor – Berényi, Sándor:* Szervezéstan (The Science of Organization, University textbook.) Budapest, 1970. p. 97 – 98.

[24] Op. cit.

[25] *Buza, László:* A nemzetközi jog jogi természete (The Juridical Nature of International Law). Budapest, 1922. p. 6.

[26] *McDougal, M. S.* op. cit.

[27] *Haraszti – Herczegh – Nagy*, op. cit. p. 26.

[28] *Kulcsár, Kálmán:* Az ember és társadalmi környezete (Man and his Social Environment). Budapest, 1969. p. 255.

[29] *Weber, Max:* Economy and Society (Hungarian translation). Budapest, 1967. p. 55.

[30] *Scheinman, Lawrence:* Some Preliminary Notes on Bureaucratic Relationship in the European Economic Community. International Organization. Vol 20, No. 4. 1966. p. 752.

[31] See in more detail *Valki, László:* A Közös Piac szervezeti és döntéshozatali rendszere (Organization and Decision – Making of the European Communities.) Budapest, 1977. pp. 23 – 38.

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[33] *Peschka, Vilmos:* Max Weber jogszociológiája (Max Weber' Sociology of Law). Budapest, 1975. p. 98.

[34] Op. cit. pp. 103 – 104.

DIE SOZIALE NATUR DES VÖLKERRECHTS

von

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(Inhalt)

1. Die Entwicklung des rechtsphilosophischen Denkens über die Natur des Völkerrechts. 2. Das Völkerrecht als Form des internationalen Decision-Making. 3. Die Natur des völkerrechtlichen Decision-Making: Die Koordination der Subordinationsbeschlüsse der zentralen Machtorganen. 4. Das Problem des völkerrechtlichen Gewonheitsrechts und der monistischen und dualistischen Auffassung.

ОБЩЕСТВЕННАЯ ПРИРОДА МЕЖДУНАРОДНОГО ПРАВА

(Содержание)

1. Развитие правотеоретических размышлении о природе международного права. 2. Международное право как форм международного принятия решении. 3. Природа международного принятия решении: Координация субординационных решении центральных органов власти интересованных государств. 4. Проблемы международноправового обычая и монистической-дуалистической теории.